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No. 92-1486

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDDIE J. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Civil Service Reform Act provides that when federal employees have a collective bargaining agreement with the government, the agreement's grievance procedures "shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1). The question presented is whether the court of appeals properly determined that petitioners may pursue pay claims only through their collective bargaining agreements' grievance procedures.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Aamodt v. *United States*, 976 F.2d 691 (Fed. Cir. 1992)	7
American Federation of Government Employees v. *OPM*, 821 F.2d 761 (D.C. Cir. 1987)	7-8
Carter v. *Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), cert. denied, 498 U.S. 811 (1990)	5, 6
Muniz v. *United States*, 972 F.2d 1304 (Fed. Cir. 1992)	5-6
United Power Trades Council & United States Army Corps of Engineers, North Pacific Division, 21 F.L.R.A. 501 (1986)	3, 4
United Power Trades Organization & U.S. Army Corps of Engineers North Pacific Division, 30 F.L.R.A. 639 (1987)	4
United States v. *King*, 395 U.S. 1 (1969)	8

Statutes:

Civil Service Reform Act, 5 U.S.C. 7101 *et seq.*	4
5 U.S.C. 7121	6
5 U.S.C. 7121(a)	6
5 U.S.C. 7121(a)(1)	5, 7
5 U.S.C. 7121(b)	6
Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, 106 Stat. 4516:	
§ 902, 106 Stat. 4516	1
§ 911, 106 Stat. 4520	1

Statutes—Continued: Page

Prevailing Rate Systems Act, 5 U.S.C. 5341-5349 2
5 U.S.C. 5341 2
5 U.S.C. 5343(a)(1) 2
5 U.S.C. 5343(a)(2) 2
5 U.S.C. 5343(a)(4) 2
5 U.S.C. 5343 note (1982 amendment) 3
Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, 96 Stat. 832 3
Tucker Act, 28 U.S.C. 1491(a) 8

Miscellaneous:

S. Rep. No. 516, 97th Cong., 2d Sess. (1982) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 979 F.2d 840. The opinion of the Court of Federal Claims (Pet. App. A13-A54) is reported at 20 Cl. Ct. 542.[1]

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[1] Effective October 29, 1992, Congress renamed the United States Claims Court the "United States Court of Federal Claims." See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, §§ 902, 911, 106 Stat. 4516, 4520. Throughout this brief, we refer to the court by its new name.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1992. A petition for rehearing was denied on December 1, 1992. Pet. App. A56. The petition for a writ of certiorari was filed on March 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are present or former employees of the Army Corps of Engineers (Corps) whose wages were and are governed by the Prevailing Rate Systems Act, 5 U.S.C. 5341-5349. Pet. App. A2. The general policy of that statute is that federal prevailing rate employees should be paid comparably to private sector workers performing similar tasks in the same geographic area. See 5 U.S.C. 5341. The Office of Personnel Management (OPM) defines geographical wage areas and designates a lead agency for each area. 5 U.S.C. 5343(a)(1) and (2). The head of each agency employing prevailing rate employees in a particular geographic area is required to apply to those employees the wage schedules developed by the lead agency in that area. 5 U.S.C. 5343(a)(4). As relevant to this case, OPM has designated the Department of Defense Wage Fixing Authority (DODWFA) as the lead agency for developing wage schedules. Pet. App. A20.

In 1979, Congress capped the salaries of most federal employees, including prevailing rate Corps employees, but excluded from that limitation certain employees of the Departments of Energy and the Interior. Pet. App. A17-A18. By 1982, employees of those agencies were earning more than Corps employees in similar positions. *Id.* at A18. In an attempt to achieve pay parity (see S. Rep. No. 516, 97th Cong., 2d Sess. 80 (1982)), Congress excepted Corps employees from the general requirements of the Prevailing Rate Systems Act:

> Without regard to any other provision of law limiting the amounts payable to prevailing wage rate employees, United States Army Corps of Engineers employees * * * shall be paid * * * wages as determined by the [DODWFA] to be consistent with wages of the Department of Energy and the Department of the Interior employees performing similar work in the corresponding area whose wage rates are established in accordance with [applicable law].

Supplemental Appropriations Act, 1982, Pub. L. No. 97-257, 96 Stat. 832, codified at 5 U.S.C. 5343 note (the 1982 amendment). Pursuant to the 1982 amendment, the DODWFA established revised wage schedules that increased the base wages of Corps employees approximately 19 percent, to correspond to the wages paid Interior and Energy Department employees. Pet. App. A20-A21 & n.5. Because the employees of those agencies did not receive "premium pay" (environmental hazard pay, seniority pay, and night shift differential pay), the DODWFA determined that Corps employees were not entitled to such pay either. *Id.* at A3-A4, A16.

2. All petitioners are or were members of the United Power Trades Organization, a federal employees' union. Pet. App. A22. In 1982, 1985, and 1988, the union and the Corps entered into collective bargaining agreements. *Ibid.* The 1982 collective bargaining agreement provided for premium pay, including night shift differential pay. *Id.* at A26. Following the implementation of the revised wage schedules pursuant to the 1982 amendment, petitioners' union filed a grievance challenging the termination of night shift differential pay. *Id.* at A4 n.1, A27. The arbitrator ordered the Corps to reinstate night shift differential pay.

The Corps petitioned the Federal Labor Relations Authority (FLRA) for review. See *United Power Trades Council & United States Army Corps of Engineers,*

North Pacific Division, 21 F.L.R.A. 501 (1986). The FLRA noted that the 1982 amendment "clearly and unequivocally requires that prevailing rate employees of the Corps of Engineers * * * shall be paid wages as determined by the [DODWFA] to be consistent with wages of employees of the Departments of the Interior and Energy who perform similar work in the corresponding area." *Id.* at 504. Because the DODWFA had "determined that Interior and Energy employees in comparable positions were not paid a shift differential," the FLRA set aside the arbitrator's award as inconsistent with the 1982 amendment. *Ibid.*

As a result of the 1982 amendment, subsequent collective bargaining agreements did not contain premium pay provisions. See Pet. App. A26-A27. Petitioners' union sought to reestablish three provisions requiring the payment of premium pay to Corps employees. See *United Power Trades Organization & U.S. Army Corps of Engineers North Pacific Division*, 30 F.L.R.A. 639 (1987). The FLRA found that the union's premium pay proposals would require the Corps to use procedures for payment of premium pay different from those required by the 1982 amendment, and it accordingly held the proposals non-negotiable because they would "require negotiations regarding pay matters for which the [1982 amendment] establishes an exclusive pro-cedure." *Id.* at 643.

3. Petitioners subsequently filed this suit in the Court of Federal Claims for "unpaid wages" under their collective bargaining agreements. Pet. App. A17. Specifically, petitioners sought premium pay and interest retroactive to May 29, 1983. *Id.* at A4-A5, A14. The Court of Federal Claims dismissed the suit for lack of jurisdiction. *Id.* at A13-A54.

The court explained that the collective bargaining agreements applicable to petitioners are governed by the

Civil Service Reform Act, 5 U.S.C. 7101 *et seq.* (CSRA), which provides that a collective bargaining agreement must contain grievance procedures that, with limited exceptions not relevant here, "shall be the *exclusive* procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (emphasis added). Federal courts accordingly lack jurisdiction to entertain disputes that are subject to those procedures. *Carter* v. *Gibbs*, 909 F.2d 1452, 1458 (Fed. Cir.) (en banc), cert. denied, 498 U.S. 811 (1990). The Court of Federal Claims explained that

> *Carter* stands for the proposition that, with regard to pay matters of the type at issue here, if such pay matters are not specifically excluded from the grievance procedure by the terms of the collective bargaining agreement, they are "grievances" within the meaning of * * * the CSRA, and are therefore subject to resolution exclusively through the grievance procedure, even though the grievance procedure has resulted in a determination that the pay matters in dispute are non-negotiable.

Pet. App. A46. Examining the provisions of the collective bargaining agreement applicable to petitioners, the Court of Federal Claims concluded that the pay claims at issue in this case had not been excluded from application of the negotiated grievance procedures. *Id.* at A44-A48. The court accordingly dismissed the complaint. *Id.* at A47-A48, A52-A54.

4. The Federal Circuit affirmed. Pet. App. A11-A12. The court noted that it had held, following *Carter*, that "grievances which are cognizable under section 7121(a)(1) and are not explicitly and unambiguously excluded by the parties * * * from the agreement's compulsory grievance and arbitration procedures are exclusively subject thereto." Pet. App. A7 (quoting

Muniz v. *United States*, 972 F.2d 1304, 1319 (Fed. Cir. 1992)). The court then turned to the facts of this case:

> The gravamen of [petitioners'] complaint is that the Corps improperly discontinued the payment of premium pay pursuant to the wage schedules set by the DODWFA under the 1982 Amendment. Their claims are essentially claims for pay, and as such, can only be brought against their employer, the Corps. The fact that the DODWFA set the wage rate does not take this case out from the *Muniz* rule. Irrespective of who determines the wage rate, these pay claims must be brought against the employer and they are subject to the collective bargaining agreement.

Pet. App. A10-A11. The court agreed with the Court of Federal Claims that the agreements here did not exclude petitioners' pay claims from application of the negotiated grievance procedures and therefore affirmed the dismissal of the complaint for lack of jurisdiction. *Id.* at A11-A12.

ARGUMENT

1. The Federal Circuit has consistently held that Section 7121 of the CSRA states a straightforward rule: A collective bargaining agreement's grievance procedures are the exclusive means for resolving disputes under the agreement, unless the agreement expressly excludes the disputed matter from application of those procedures. 5 U.S.C. 7121(a) and (b). See *Carter* v. *Gibbs*, *supra*, and *Muniz* v. *United States*, *supra*. In this case, there is no question that "[t]he collective bargaining agreements between the Corps and the union governed the terms and conditions of [petitioners'] employment." Pet. App. A7-A8. Petitioners seek "unpaid wages" under those agreements. *Id.* at A17. As the courts below found, the collective bargaining agreements do not exclude petitioners' pay claims from application of

the agreements' grievance procedures. Petitioners' pay claims are therefore subject to resolution exclusively through the grievance procedures, and the Court of Federal Claims properly dismissed petitioners' complaint for lack of jurisdiction.

2. Petitioners do not contest the general jurisdictional rule articulated in *Carter* and *Muniz*. Instead, they argue that the exclusive remedy provision of Section 7121(a)(1) does not apply to them because their dispute is with the DODWFA, and not with the Corps. See Pet. 16, 25-26. That contention is meritless. The collective bargaining agreements govern the employment relationship between petitioners and the Corps. Although the DODWFA set applicable wage rates, petitioners' wages are actually paid by the Corps. The dispute between petitioners and the Corps is subject exclusively to the negotiated grievance procedures, because the agreements do not exclude their pay claims from application of the grievance procedures. See *Aamodt* v. *United States*, 976 F.2d 691, 692 (Fed. Cir. 1992) ("[T]he grievance procedure [is] the exclusive recourse in situations where the subject matter in dispute [is] not excluded by the terms of the agreement.").[2]

3. Petitioners contend (Pet. 17-18) that the Federal Circuit's decision conflicts with various decisions from other courts. Those decisions, however, are inapposite, because they involve district court actions to set aside

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[2] As the Court of Federal Claims recognized, "it is difficult not to view the matter as a grievance when [petitioners] took the matter through the grievance procedure to the highest administrative level [*i.e.*, the FLRA]." Pet. App. A51. The fact that petitioners were unsuccessful in obtaining relief pursuant to the negotiated grievance procedure does not give them the right to try a second time in the courts; otherwise, the exclusive remedy provision of Section 7121(a)(1) would be rendered meaningless.

agency action. See, *e.g.*, *American Federation of Government Employees* v. *OPM*, 821 F.2d 761, 763 (D.C. Cir. 1987) (APA challenge to OPM's method of determining overtime compensation). As petitioners acknowledge, they brought this suit in the Court of Federal Claims under the Tucker Act to obtain "back pay" under their collective bargaining agreements. Pet. 9, 14. If petitioners now contend that they are asserting something other than a claim for money under those agreements, see Pet. 21 (arguing that their "claims are that DODWFA has erred in establishing the pay schedule"), then the Court of Federal Claims would lack jurisdiction under the terms of the Tucker Act itself, 28 U.S.C. 1491(a), to grant them relief. See, *e.g.*, *United States* v. *King*, 395 U.S. 1, 3 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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